

Title

May one effectively add one's personalty to the corpus of an inter vivos trust via gift *causa mortis*?

Text

It has long been settled that one via a will may effectively “pour over” one's real and personal property into an inter vivos trust. See §2.1.1 of *Loring and Rounds: A Trustee's Handbook* (2026), the relevant portions of which section are reproduced in the appendix below. But could a common law gift *causa mortis* of personalty also function as a funding vehicle? Recall that generally a present transfer of personalty via a delivered and accepted gift *causa mortis* was enforceable at common law, even though enjoyment was subject to the conditions subsequent of (1) absence of inter vivos revocation and (2) ultimate death as anticipated. That a common law gift *causa mortis* entails a present delivery by the transferor and a present acceptance by the transferee suggests that, at least in principle, the gift *causa mortis* should serve as an effective, albeit somewhat impractical, substitute for the “pour-over” will. The mechanics of funding via gift *causa mortis*? The property owner assigns legal title to the subject property to the trustee, not, however, for the benefit of the trustee but for the benefit of the beneficiaries as provided by the trust's terms.

A cursory reading of *Bryan v. Aymond as Trustee of Dalila Aymond Trust*, 417 So.3d 96 (La. 2025) suggests as much, at least in Louisiana: “An addition of property to an existing trust by donation *mortis causa* is effective at the moment of the donor's death.” See La.R.S 9:1936. But wait. Something is not right. There is the matter of word order. Under Louisiana law is a donation *mortis causa* the same as a donation *causa mortis*? Apparently not. A “donation *mortis causa*” is essentially the equivalent of a testamentary transfer, that is a transfer by will. Louisiana has not been receptive to the common law's “gift *causa mortis*.” See *Succession of Sinnott v. Hibernia Nat. Bank*, 30 So. 233 (1901). So it seems that under Louisiana law one may not effectively add one's personalty to the corpus of an inter vivos trust via gift *causa mortis*. On the other hand, common law gifts *causa mortis* generally are enforceable in a number of other states (U.S.), New York and Massachusetts being two. The Uniform Probate Code is agnostic as to the general enforceability of such conditional gifts.

As an aside, in *Bryan*, both the trial court and the dissenters on appeal had failed to appreciate that, postmortem, the designated recipient trustee in a pour over situation is burdened with a fiduciary duty to the trust beneficiaries to see to it

that the PR charged with administering the probate estate properly carries out his, her, or its fiduciary duties, this even before the trustee has taken physical possession of that portion of the probate estate to which the trust is entitled. We elaborate generally in the appendix below. See the final paragraph. And even when the PR and the recipient trustee are one and the same, as was the case in *Bryan*, the PR may not subvert the legitimate equitable property rights of the trust's beneficiaries by engaging in unauthorized self-dealing.

Appendix

§2.1.1 *The Inter Vivos Trust* [from *Loring and Rounds: A Trustee's Handbook* (2026)]

Pouring over by will into a token funded inter vivos trust. Under the common law, for a will's pour-over provision to be effective, the trustee needed to have taken title to at least a nominal or token amount of property, *e.g.*, a cent or a peppercorn, *during the lifetime of the settlor*. Otherwise, the pour-over bequest or devise to the trustee would fail or lapse because of the nonexistence of a recipient inter vivos trust.⁸⁰ Without property, there could be no trust, and without a trust, there could be no trustee to receive the bequest or devise. Moreover, “[a]n expectation or hope of receiving property in the future, or an interest that has not come into existence or has ceased to exist, cannot be held in trust.”⁸¹

The practice of token funding inter vivos trusts was an accommodation to the property requirement that is embedded in the common law of trusts, though to this day the practice has its skeptics, including the American Law Institute: “[I]f a nominal amount of property is included in the inter vivos trust, it is questionable whether it can be considered to have the independent significance necessary for the doctrine's application.”⁸²

The debate over the sufficiency of token funding in the context of the law of trusts is not to be confused with the debate over adequacy of consideration in the context of contract law, though down through the years the lowly peppercorn has figured

⁸⁰See generally §8.15.55 of this handbook (lapse).

⁸¹Rest. (Third) of Trusts §41. See also §8.15.42 of this handbook (the potential possession doctrine).

⁸²Rest. (Third) of Trusts §19 cmt. b. For a discussion of the doctrine of independent legal significance, see §8.15.9 of this handbook. See also Rest. (Third) of Property (Wills and Other Donative Transfers) §3.8, cmt. d. (“The only requirement under the doctrine of independent significance is that the inter vivos trust must be *more than nominally funded* in order to give the trust document and any subsequent amendments independent significance.”).

prominently in each: “The rule that market equivalence of consideration is not required ... [for an enforceable contract]..., and that the value of the consideration is to be left solely to the free bargaining process of the parties, leads in extreme cases to seeming absurdities. When the consideration is only a ‘peppercorn’ or a ‘tomtit’ or a worthless piece of paper, the requirement of a consideration appeared to Holmes to be as much a mere formality as is a seal.”⁸³

In any case, the trustee should be aware that there are now statutes on the books in many states that create an exception to the common law requirement that for a pour-over to be effective the trustee of an inter vivos trust needs to take title to at least a nominal or token amount of property while the settlor is alive. The statutory exception generally applies only to “inter vivos” trusts that have associated pour-over wills.⁸⁴ Under §2-511(a) of the UPC, the trust instrument can even be prepared *after* the settlor’s pour-over will has been executed. For more on these legislative intrusions into the common law of trusts, i.e., the common law as enhanced by equity, see §2.2.1 of this handbook and §8.15.100 of this handbook.

Moment when interest in property subject to testamentary pour over becomes a trust asset. Assume a will provides that the residue of the probate estate shall be transferred to the trustee of an inter vivos trust, said property to be held in accordance with the trust’s terms. When does interest in the residue become a trust asset? (1) When the will is executed (signed by testator and witnesses)? (2) When the testator dies? (3) When the executor/personal representative (PR) transfers possession to the trustee? Answer: (2). At the time of the testator’s death, the trustee received a vested equitable property interest, subject to partial or total divestment in satisfaction of postmortem third-party claims against the residue. In equity, possession of legal title and/or the subject property itself is not determinative of rights ownership. A trust beneficiary’s equitable interest in the trust property, for example, whether present or future, vested or contingent, is itself an interest in property, though legal title to the trust corpus itself is in the trustee. Think shares of beneficial interest in a trustee mutual fund. So also a devisee’s equitable interest in the probate estate is property, even when the PR has yet to relinquish legal title. The practical significance of all of this is that the trustee owes the trust beneficiaries a fiduciary duty, and perforce possesses a fiduciary entitlement, to ride herd on the one, namely the PR, who has legal title to and temporary fiduciary control of the pour-over property. The PR, in other words, is accountable to the trustee even before the trustee takes possession of the pour-over property. It is self-evident that the trustee acquires no rights in, and assumes no fiduciary duties with respect thereto, the testator’s property while the

⁸³Arthur Linton Corbin, 1 Corbin on Contracts §127 (1963) (citing to the opinion of Oliver Wendell Holmes in *Krell v. Codman*, 154 Mass. 454, 28 N.E. 578 (1891)).

⁸⁴See §2.2.1 of this handbook (the pour-over statute).

testator is alive, as a will speaks at death.
